

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRI J. FOLK)	
Claimant)	
VS.)	
)	Docket No. 250,251
HEART OF AMERICA HOSPICE)	
Respondent)	
AND)	
)	
TIG PREMIER INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed Administrative Law Judge Bryce D. Benedict's January 13, 2000, preliminary hearing Order Denying Compensation.

ISSUES

The Administrative Law Judge denied claimant's request for payment of temporary total disability benefits.

Claimant's application for review described the issue on appeal as follows:

Whether a proper defense is presented if Claimant's request for temporary total disability compensation at a Preliminary Hearing is greater than six (6) months overdue, particularly where Respondent/insurance carrier presents no defense to payment of said temporary total disability compensation.

Claimant, in her brief, claims the Appeals Board has jurisdiction to review the issue raised because the Administrative Law Judge has created a "certain defense" under K.S.A. 1999 Supp. 44-534a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board makes the following findings and conclusions:

While lifting at work on July 17, 1998, claimant injured her back. Respondent provided medical treatment for the injury, first through a family practice physician, Dennis D. Tietze, M.D., in Topeka, Kansas. Also, claimant received extensive treatment through a physical therapy program that continued through October 6, 1998. On January 13, 1999, at the request of respondent's insurance carrier, claimant was examined by Dale D. Dalenberg, M.D., in Leavenworth, Kansas. At that time, Dr. Dalenberg determined that claimant had met maximum medical improvement and released claimant to return to work with permanent restrictions.

At the preliminary hearing, the parties stipulated claimant was entitled to weekly compensation benefits at the maximum compensation rate of \$366. The respondent had paid claimant temporary total disability benefits in the sum of \$1,153.28. Accordingly, utilizing \$366 per week as a temporary total disability rate, respondent would have paid claimant 3.15 weeks of temporary total disability benefits.

On appeal, claimant contends she was entitled to 24.86 weeks of temporary total disability compensation for the period from July 24, 1998, through January 13, 1999. Therefore, claimant makes a claim for a total of 21.71 additional weeks of temporary total disability benefits at the rate of \$366 per week for a total sum of \$7,945.86.

The Administrative Law Judge denied claimant's request for the additional weeks of temporary total disability compensation. Claimant argues the Administrative Law Judge erred in not awarding the additional temporary total disability weeks because the Administrative Law Judge based his decision on a policy of not awarding temporary total disability benefits for time periods that are more than six months before the claimant filed an Application for Preliminary Hearing.

The first issue the Appeals Board will address is whether it has jurisdiction to review this preliminary hearing issue. The only issue raised by the claimant relates to the payment of temporary total disability benefits. The claimant contends jurisdiction exists because the Administrative Law Judge has created a "certain defense" by establishing a policy not to award temporary total disability compensation for time periods that are more than six months before the filing of an Application for Preliminary Hearing.

The Appeals Board has addressed the "certain defense" language on many previous occasions. The Appeals Board has held that a "certain defense," as it applies to K.S.A. 1999 Supp. 44-534a, is only a defense that relates to the compensability of the claim. For example, defenses raised by the respondent as to intoxication or willful failure to use a guard as provided by K.S.A. 1999 Supp. 44-501(d)(1)(2) are "certain defenses"

that, if disputed, would give the Appeals Board jurisdiction to review a preliminary hearing order. But the Appeals Board finds the question of whether or not to award past due temporary total disability compensation at a preliminary hearing, for time periods more than six months before an Application for Preliminary Hearing was filed, is not a "certain defense" as contemplated by K.S.A. 1999 Supp. 44-534a.¹

Furthermore, the Appeals Board finds, as it likewise has on numerous occasions, it does not have jurisdiction, at this juncture of the proceedings, to review a preliminary hearing finding of the Administrative Law Judge in regard to temporary total disability compensation. The preliminary hearing statute gives the Administrative Law Judge authority to grant or deny a request for either medical or temporary total disability compensation, pending a full hearing on the claim.² Accordingly, the Administrative Law Judge did not exceed his jurisdiction by denying claimant's request for temporary total disability compensation.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that claimant's appeal is dismissed and Administrative Law Judge Bryce D. Benedict's January 13, 2000, preliminary hearing Order Denying Compensation remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Kevin J. Kruse, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director

¹See Schlabach v. Contemporary Industries Southern, WCAB Docket No. 198,828 (January 1999).

²See K.S.A. 1999 Supp. 44-534a.